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2011 APPELLATE CASES FROM THE DEFENSE PERSPECTIVE

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2011 APPELLATE COURT CASES – FROM A DEFENSE PERSPECTIVE

By James P. Cleary, Deputy Legal Defender, Maricopa County

I. SUBSTANTIVE

State v. Montes, 226 Ariz. 194, 245 P.3d 879 (2011)

The court addressed the issue of whether the retroactive application of A.R.S. 13-205, which imposed a duty on the prosecution to prove beyond a reasonable doubt that a defendant did not act with justification, was a valid exercise of the legislature's power to retroactively grant new rights to criminal defendants. Defendant had been tried and convicted in 2008 of murder that was committed in 2005. In 2009 the legislature approved legislation which made its 2006 amendment to 2-205 retroactive to all cases pending in 2006 where a justification defense was raised. The trial court and court of appeals denied relief on defendant's claim that he should benefit from the retroactive application. At trial the jury was instructed on the pre-2006 law which required defendant to prove his defense by a preponderance of the evidence.

The court held that the legislation making the application retroactive was an appropriate exercise of its rights, and not a violation of the separation of powers doctrine. The court concluded that its opinion in **Garcia v. Browning**, 214 Ariz. 250, 151 P.3d 533 (2007) did not imply that the legislature could not make 13-205 retroactive. **Garcia** only held that the amendment in 2006 did not indicate that the amendment was other than prospective.

State v. Regenold, 226 Ariz. 378, 249 P.3d 337 (2011)

Defendant appealed following a contested probation revocation hearing. On appeal, he challenged the legality of the sentence he had received when he was initially placed on probation for one count of luring a minor for sexual exploitation. Defendant had not previously challenged the sentence's legality in a post plea Rule 32 petition.

The court held that A.R.S. 13-4033(B) does not prohibit a defendant from challenging his sentence by an appeal following a contested probation revocation hearing. The court found that Rule 32.1 and 13-4033(B) only applied to situations where defendant pled guilty or admitted violation of probation.

State v. Eddington, 228 Ariz. 361, 266 P.3d 1057 (2011)

Defendant was charged as an accomplice to a murder. A juror at his trial outlined during *voir dire* his current employment with the Sheriff's Office (Pima County) that investigated the homicide as well as his familiarity with one-third to one-half of the prospective witnesses as well as the lead detective. Defendant's motion to strike the juror for cause was denied since the juror avowed he could be fair and impartial. Defendant's resulting conviction was affirmed but the court of appeals found that the juror should have been struck for cause under A.R.S. 12-211(2) as an "interested person". No prejudice was found though as the juror did not participate in deliberations and verdict. **State v. Eddington**, 226 Ariz. 72, 244 P.3d 76 (CA2 2010).

On a petition for review by the state, the court agreed with the court of appeals and found that the juror was an "interested person" under A.R.S. 12-211(2). It found that the statute was aimed at bias that may be inherent due to a working relationship between the prosecution and the investigating agency involved in a particular case. It held that a peace officer currently employed by the law enforcement agency that investigated the case is an "interested person" who is disqualified from sitting as a juror.

State v. Stapley, 227 Ariz. 61, 251 P.3d 1048 (CA1 2011)

Defendant was charged by indictment with felonies and misdemeanors for violating state and county financial disclosure statutes and regulations, i.e., A.R.S. 38-541, 542, 544 and 545 and Maricopa County Rule or Resolution adopted January 20, 1994. The defendant moved to dismiss the charges on the basis that there was no written county rule or resolution which set forth disclosure requirements for elected county officials. The trial court dismissed the charges.

On a state appeal the court of appeals affirmed the trial court dismissal. It reviewed the pertinent statutes and county resolutions and determined that the county had not formally adopted any disclosure requirements or rules as alleged by the state in 1994. The court found that the statutes at issue could not and did not incorporate analogous state disclosure rules. Consequently, the court held that the defendant could not be charged with violating disclosure requirement that did not exist.

Winterbottom v. Ronan, 227 Ariz. 364, 258 P.3d 182 (CA1 2011)

Crime victims sued defendant for civil damages following defendant's plea of guilty in a child molestation prosecution. Defendant settled with the victims and then sued his counsel for neglect in the handling of the civil proceedings. Defendant's counsel retained counsel who then requested a deposition of the victims. The crime victims resisted the deposition request on the grounds the crime victim's bill of rights allowed

them to decline interview requests. The trial court denied the crime victim's request to refuse an interview/deposition.

On a special action appeal the court affirmed the trial court ruling. It found that the matter was a civil matter and was not an interview by defendant or his representative. Further, a protective order by the trial court precluded questions concerning the original crime of the defendant against the victims.

State v. Garcia, 227 Ariz. 377, 258 P.3d 195 (CA1 2011)

Defendant was charged with multiple crimes resulting from a kidnapping of a drug courier. He was convicted of a class 2 felony of theft by extortion, A.R.S. 13-1804 (A)(1). The operative facts relevant to such charge were that the defendant relayed to those being extorted that the victim would die or that they would beat the victim. There was no evidence that the threats to kill the victim would be by use of deadly weapon or dangerous instrument.

On appeal the defendant's conviction for a class 2 felony of theft by extortion was vacated. The court found there was no evidence at trial to indicate the extortion attempts were accompanied by threats to cause physical injury by means of a deadly weapon or dangerous instrument. The court did find the evidence sufficient for a lesser offense, class 4 felony, of extortion where the threats need not be accompanied by physical injury by dangerous instrument or deadly weapon.

State v. Boehler, 228 Ariz. 33, 262 P.3d 637 (CA1 2011)

Defendant was arrested, tried and convicted of violating Phoenix City Code section 23-7(B) (4) which made it unlawful to vocally "solicit any money or other thing of value, or to solicit the sale of goods or services" after dark in a public area. Defendant was sitting on a downtown Phoenix sidewalk after an Arizona Diamondbacks game when undercover officers walked by him and he asked the officers if they could spare some change.

The court examined the ordinance and determined that the ordinance purpose was a valid and legitimate attempt to police aggressive solicitations in the city. However, the court found that the language was overbroad and infringed on established First Amendment rights. The ordinance needed to be narrowly tailored to overcome violation of free speech rights. The ordinance was not narrowly drawn and consequently was unconstitutionally overbroad.

State v. Gray, 227 Ariz. 424, 258 P.3d 242 (CA2 2011)

In a domestic violence prosecution the defendant was convicted, among other domestic violence charges, of a violation of A.R.S. 13-2804, tampering with a witness. The evidence supporting such conviction was based on a letter the defendant sent to the victim, which the victim never read. The victim testified at defendant's trial and detailed the facts of domestic violence necessary for defendant's conviction.

On appeal, the court examined the portion of the witness tampering statute which required that there be proof the defendant "induces" a witness to withhold evidence, testify falsely or absent themselves from a proceeding where the witness has been summoned to appear. The court concluded that the statutory intent required evidence that a witness did actually perform one of the acts, i.e. absent themselves, testify falsely or withhold evidence, before a conviction can result. This did not occur at the trial so the conviction was vacated.

State v. Fikes, Ariz. , P.3d , 2011 WL 6318947 (CA2 2011)

Defendant was charged with aggravated DUI. He moved to suppress evidence obtained during a warrantless stop of the vehicle he was driving claiming the stop was not supported by reasonable suspicion. The arresting officer testified the sole reason he stopped defendant's vehicle was because the brake light located on the top rear of defendant's vehicle was not working and thus in violation of A.R.S. 28-939. Testimony included information that the vehicles other two brake lights were working. The trial court denied the motion to suppress and defendant was convicted.

On appeal, the court determined that A.R.S. 28-927 required that a vehicle have one stop lamp. It concluded that since the defendant's vehicle had at least one working stop lamp, i.e. brake light, then there was not a reasonable suspicion to stop defendant's vehicle. Hence, any evidence gained from the stop should have been suppressed. The convictions and sentences were vacated.

II. PROCEDURAL

Morehart v. Barton, 226 Ariz. 510, 250 P.3d 1139 (2011)

Defendant was charged with several counts of capital murder. As part of mitigation investigation, the trial court granted a defense request for an *ex parte* hearing on issuance of out of state summonses and certificates to obtain possible mitigation evidence from third parties. The crime victims objected asserting that they had a right to be present at all court proceedings related to the capital charges. The trial court overruled

the victim objections. On special action review, the court of appeals vacated the trial court order noting that the Arizona constitution gives victims the right to be present at all criminal proceedings where the defendant has the right to be present. The supreme court granted review to determine whether crime victims are entitled to attend *ex parte* hearings concerning defendant's pretrial mitigation discovery.

The court found that the *ex parte* hearing was permissible under Rule 15.9(b), Ariz. R. Crim. Pro. It concluded, however, that a proceeding on return of summonses is not a proceeding where a defendant has a right to be present. Since the hearing was purely procedural and did not require the defendant's presence, then the crime victims had no right to attend.

Bashir v. Pineda, 226 Ariz. 351, 248 P.3d 199 (CA1 2011)

Defendant was charged by grand jury indictment for responsibility in the death of her son by a drowning in the family pool. Prior to any grand jury proceedings, an attorney for the defendant provided to the county attorney a ten page letter detailing the defendant's background and matters at odds with the police investigation. Ultimately, the attorney requested that the letter and attached documents be presented to the grand jury if the case was presented to the grand jury and that the defendant would like to testify at the grand jury. When the case was presented to the grand jury the prosecutor advised the grand jury that the defendant had made a written request to testify. The grand jury responded that a majority did not want to hear from the person that's accused of the crime. Upon indictment, the defendant filed a motion under 12.9, Ariz. R. Crim. Pro., claiming the prosecutor failed to communicate to the grand jury information concerning testimony and evidence she wished to present pursuant to A.R.S. 21-412 and Rule 12.6 Ariz. R. Crim. Pro. The trial court denied the motion to dismiss or remand.

On special action review the court of appeals vacated the court's order overruling the defense motion. It reasoned that precedent required the prosecutor to present information to the grand jury from a defendant who has provided some degree of detail of the proposed evidence. Similarly, it concluded that the prosecutor was required to convey to the grand jurors the outline of the defendant's proposed testimony so the grand jury could make an informed decision whether to hear from the defendant.

State v. Bunting, 226 Ariz. 572, 250 P.3d 1201 (CA1 2011)

Defendant was charged with misconduct involving weapons. She waived her right to a jury trial and her case was submitted on a stipulated record of police reports. The court then heard evidence concerning defendant's defense of insanity and found the defendant had not proven her defense by clear and convincing evidence. She was convicted and sentenced to prison.

On appeal the court of appeals found error in the procedure the court employed to determine whether the defendant had knowingly and voluntarily waived her right to a determination of guilt on a stipulated/submitted record. The court found that while the waiver of a jury trial was properly conformed, the determination of guilt on a stipulated record required compliance with Rule 17 and precedent where all of a defendant's rights, beyond that of a jury trial, are addressed with the defendant.

Haag v. Steinle, 227 Ariz. 212, 255 P.3d 1016 (CA1 2011)

Defendant was charged with sexual exploitation of a minor. He sought release and requested to return to his home in Buffalo, New York pending trial. Since defendant's charge was an alleged violation of chapter 14, A.R.S. 13-3967 was relevant to his release conditions. The trial court read 13-3967 (E) as requiring defendant to remain in Maricopa County where electronic monitoring was available and thus denied his request to return to his home where electronic monitoring was not available.

Defendant sought special action review and relief. The court of appeals accepted jurisdiction, granted relief and remanded to the trial court. The court found that the legislative history of the statute recognized that electronic monitoring would not be available in all counties. It held that requiring a defendant to remain in the charging county rather than their home county pending charges raised constitutional implications and equal protection concerns. Consequently, the trial court was directed to reconsider the defendant's release to his home in Buffalo, New York.

Costa v. Mackey, 227 Ariz. 565, 261 P.3d 449 (CA1 2011)

Defendant was charged with continuous sexual abuse of a child. The alleged crime occurred over a five year time period. Defendant requested release conditions. The court determined that his charges were bondable offenses. His bail was set at **\$75 million cash only**. Defendant sought special action review on his claim the bond amount was excessive.

The court reviewed the bond in view of A.R.S. 13-3967(B) and its twelve factors relevant to determination of an appropriate bond. It determined that the defendant – an unemployed man dependent upon others for financial assistance – did not fall anywhere near inclusion in the elite group of extraordinarily wealthy individuals who would be able to post \$75 million in cash to secure release pending trial. Consequently, it held the trial court abused its discretion in setting a clearly excessive bond. It remanded for a new release order that establishes the least onerous bail amount and other reasonable release conditions.

State v. Innes, Ariz. , 260 P.3d 1110 (CA1 2011)

Defendant was convicted of sexual abuse after a trial to the court. On appeal it was determined that the trial court never conducted a waiver of jury trial colloquy with defendant consistent with Rule 18.1 (b), Ariz. R. Crim. Pro. The court determined that such failure was fundamental error requiring the conviction to be vacated and a new trial ordered.

State v. Rivera, 226 Ariz. 325, 247 P.3d 560 (CA2 2011)

Defendant was charged with multiple crimes arising from a drive-by shooting. Specifically, the indictment alleged that an R.C. was the victim of the drive by shooting. Defendant was convicted of numerous charges including the drive-by shooting of R.C.

On appeal the court found there was no evidence that R.C. was the targeted victim of the drive by shooting. The state's arguments that the jury instructions or evidence amended the charge to include "any person" as the victim of the drive by shooting were unpersuasive. The court found that Ariz. R. Crim. Pro. 13.5 (b) limited the trial to the specific charges stated in the indictment. The charges were not amended to conform to the evidence. Consequently the drive-by conviction was vacated.

State v. Limon, Ariz. , P.3d , 2011 WL 6540497 (CA2 2011)

Defendant was charged with possession and transportation of marijuana for sale. He moved to suppress evidence seized due to an alleged lack of probable cause. The trial court granted the motion to suppress. The state filed a motion for reconsideration which was denied approximately 2 months later. The state then filed a notice of appeal from the order suppressing evidence and the denial of the motion for reconsideration.

On review, the court of appeals dismissed the states appeal. It held that Ariz. R. Crim. Pro.31.3 allowed the state an appeal only within twenty days of the court order suppressing evidence. It further held that no appeal was available from the motion to reconsider.

State v. Peterson, Ariz. , P.3d , 2011 WL 6824884 (CA2 2011)

Defendant was charged with theft. At the time of her arrest she made statements to police. Prior to trial, she moved to suppress her statements to the police pursuant to Rule 16.2, Ariz. R. Crim. Pro. Her motion alleged that during one point in the police interview she had invoked her rights to remain silent. The trial court denied the motion without a hearing. Following trial and conviction, defendant appealed.

On review the court found that the trial court's summary denial of the motion to suppress was error. It concluded that the facts alleged in defendant's motion warranted a hearing as she had made a *prima facie* case for a hearing as required by Rule 16.2. It remanded to the trial court for a hearing on the defendant's suppression motion. If the statements were suppressed after hearing, then a new trial would be granted.

Turner v. Rogers, U.S. , 131 S.Ct. 2507, 180 L.Ed. 2d 452 (2011)

Defendant was incarcerated after a civil contempt hearing in South Carolina. The hearing was conducted on a claim of his failure to pay child support as previously directed by the state court. Defendant sought review in the United States Supreme Court. At issue was whether defendant was entitled to counsel at the contempt proceeding and whether he was denied due process due to incarceration for his contempt.

The Court found that due process did not require the provision of counsel for civil contempt proceedings of the type at issue. However, due process required that incarceration for non-payment of child support in this type of contempt proceeding may not be allowed where counsel was not appointed and alternatives to incarceration were not explored by or available to the trial court.

Hurles v. Ryan, 650 F.3d 1301 (9th Cir. 2011)

Defendant sought federal habeas corpus relief from his conviction for capital murder in state court for a murder of a Buckeye librarian in 1992. He claimed judicial bias by the state trial judge due to the trial judge's statements and participation in a special action proceeding prior to trial, the trial judge's pretrial statements which indicated a prejudgment of the case against defendant and the trial judge's statements challenging the professionalism of defense counsel. The federal district court denied relief.

On appeal, the court found defendant's claims meritorious and granted habeas corpus relief directing that defendant be retried or released. It held that the trial court's personal participation in a special action challenging one of her rulings, its statements about defense counsel's competence and its courtroom pretrial comments about the simplicity of the case and the overwhelming evidence of guilt before a single witness had testified all revealed a lack of impartiality and nonpartisanship necessary to insure a fair trial in a fair tribunal – a basic requirement of due process.

III. EVIDENTIARY

State v. Machado, 226 Ariz. 281, 246 P.3d 632 (2011)

The court, on review, examined defendant's conviction for second degree murder. It concluded that the trial court erred in precluding third party culpability evidence proffered by the defendant in his defense.

The court held that evidence of another suspect's violent acts and admission of responsibility for the murder was not subject to exclusion under Rule 404 (b), Ariz. R. Evid. Rather, third party culpability evidence admission is governed by application of Rules 401, 402 and 403, Ariz. R. Evid. Consequently, the proffered evidence from defendant of a third party's confession to the murder and ensuing police investigation, and that same party's instances of violent misconduct should have been allowed as it was relevant, non-prejudicial nor confusing as to the issues in the case.

State v. Fisher, 226 Ariz. 563, 250 P.3d 1192 (2011)

Defendant was charged with possession of marijuana for sale. The charges arose from a police "protective sweep" of an apartment defendant was located in after a report of a pistol whipping by defendant on another person some distance from the apartment where defendant was located. The "protective sweep" occurred because after defendant was detained for investigation a concern existed that no weapon had been found. The "protective sweep" resulted in the discovery of duffel bags of marijuana. The defendant's motion to suppress the marijuana was denied by the trial court and affirmed by the court of appeals.

On review, the supreme court reversed the conviction. The court examined the parameters of the "protective sweep" exception to the warrant requirement. It determined that the evidence at the suppression hearing was insufficient to warrant a reasonable suspicion that another person was inside the apartment that may have the weapon. Absent articulable facts to support the entry for protective purposes the resulting search and discovery was invalid.

State v. Kemper, Ariz. , P.3d , 2011 WL 5166578 (CA1 2011)

Defendant was convicted of sexual assault pursuant to A.R.S. 13-1406(A). The trial court instructed the trial jury on the elements of the offense following the language of RAJI 14.06.01.

On appeal the court found error in the trial court's failure to define the *mens rea* element governing the "without consent" element of the crime. Consequently, the

conviction was reversed and a new trial ordered due to the prejudice inherent in a failure to properly instruct the trial jury on all the elements of the offense.

State v. Aguilar, Ariz. , P.3d , 2011 WL 6778625 (CA1 2011)

Defendant was convicted of drug possession charges. Defendant motioned to suppress the evidence seized on a claim of a warrantless entry by police to his motel room and the absence of any exigent circumstances. The trial court denied the motion finding that the officer's entry to defendant's motel room was based on a reasonable suspicion of criminal activity so as to demand that the defendant open the door to the room.

On appeal the court reversed the trial court's denial of the motion to suppress. It held that the entry to the defendant's motel room could only be justified under the Fourth Amendment to the federal constitution if there was not only probable cause *but also* exigent circumstances. On review of recent Supreme Court precedent, Kentucky v. King, U.S. , 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011), and established Arizona precedent, State v. White, 160 Ariz. 24, 770 P.2d 328 (1989), the court found insufficient evidence to support a finding of exigent circumstances under the facts presented.

State v. Sprang, 227 Ariz. 10, 251 P.3d 389 (CA2 2011)

Defendant was charged with first degree murder. His defense was a claim of insufficiency of evidence to prove he was responsible for the murder. Over defendant's objection, the trial court instructed on the lesser offense of second degree murder. Upon conviction of second degree murder, with a finding by the trial jury that defendant was not guilty of first degree murder, defendant appealed.

On appeal the court found that the trial court had erred in instructing the jury on the offense of second degree murder. It reasoned that there was no support for a second degree murder instruction. The court found that the murder was a first degree murder committed by defendant or another. It reversed the conviction and remanded for a new trial where the state could proceed with a second degree murder charge.

State v. Abdi, 226 Ariz. 361, 248 P.3d 209 (CA2 2011)

Defendant was charged with aggravated assault after a fight with the victim where the victim incurred multiple stab wounds. The fight occurred in the victim's apartment where the defendant and his girlfriend had been staying as invitee's of the victim. The fight erupted when the victim advised the defendant and his girlfriend they had to leave. The defendant forced his way into the victim's apartment when the fight began. At trial the defendant's defense was self defense on a claim the victim was the aggressor. The trial court instructed the jury, upon the state's request, that the jury was to presume the

victim was acting reasonably if the victim's actions were against a person who unlawfully or forcefully entered the victim's residence. The defendant was convicted.

On appeal the court of appeals reversed the conviction. It found that the instruction on the reasonableness of the victim's actions did track the self-defense allowed by A.R.S. 13-419. However, the court concluded that 13-419 was a defense intended to apply to a criminal defendant. Further, the instructions as a whole, given the presumption as to the reasonableness of the victim's actions, were burden shifting and relieved the state of its burden to prove beyond a reasonable doubt that the defendant's justification defense was not viable. The case was remanded for a new trial.

State v. Bolding, 227 Ariz. 82, 253 P.3d 279 (CA2 2011)

Defendant was convicted in 2008 of crimes, fraudulent schemes and obstruction of prosecution, which occurred from 1991 to 2004. He absconded after conviction and was arrested and ultimately sentenced in March, 2010. After sentencing he appealed. The state moved to dismiss the appeal pursuant to A.R.S. 13-4033(C) arguing that since the sentencing was delayed more than 90 days due to the defendant's absence then the appellate court had no jurisdiction.

The appellate court concluded that it did have jurisdiction even though the sentencing was delayed more than 90 days due to the defendant's absence. It found that the statute was constitutional and was not an invalid *ex post facto* statutory enactment. However, it found that the defendant had never been advised that he could forfeit his appeal rights if he absented himself after conviction. Hence, there was no evidence to demonstrate that defendant knowingly, intelligently and voluntarily waived his right to appeal and dismissal of the appeal could not be allowed.

State v. Carlson, 228 Ariz. 343, 266 P.3d 369 (CA2 2011)

Defendant was arrested and taken into custody for questioning. The defendant was told by the detective he was going to read him his rights. Before the detective could read him his rights the defendant made statements that relayed his desire to waive his rights. The defendant's statements listed what he understood the rights to be and the detective concluded that the defendant understood his rights without ever reading the rights. Defendant made incriminating statements. Later, the defendant challenged the statements he made arguing that the waiver of his rights was not complete. The trial court suppressed the statements.

The state appealed. The court found the trial court correctly suppressed the statements as it found that the defendant's recitation of his rights was not complete, i.e. the presence of an attorney at questioning. Consequently, the waiver was not effectual.

Skinner v. Switzer, U.S. , 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011)

Skinner was convicted in Texas state court of capital murder in 1995. His defense at trial was that he was incapacitated at the time of the murder by alcohol and codeine and thus unable to commit the crimes. His defense was a third party committed the crime. Some of the evidence from the crime scene was tested and some was not. That tested was both inculpatory and exculpatory. Skinner challenged his conviction in the years following his conviction including a request for DNA testing pursuant to Texas statutes. His requests were denied on a number of grounds. He sought injunctive relief in federal court pursuant to 42 U.S.C. sec. 1983 requesting that the state be compelled to do the DNA testing he requested or allow him the available evidence for his testing. The lower federal courts declined to entertain his complaint.

The United States Supreme Court granted relief to Skinner. It evaluated whether his claim was one which was more appropriate for consideration in a federal habeas corpus proceeding or a civil rights proceeding. It concluded that under its precedent the DNA testing sought did not necessarily seek to overturn his conviction. Further, testing that revealed exculpatory evidence did not imply the invalidity of his conviction. Accordingly, his claim was a valid claim for relief which the lower federal courts could entertain. The case was remanded to the lower courts.

J.D.B. v. North Carolina, U.S. , 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)

Defendant, a 13-year-old, seventh grade student at a middle school in North Carolina, was questioned by two police officers and two school administrators at school concerning break-ins of residences. He became a suspect because it was determined he had possession of one of the stolen items from one of the break-ins. When he was taken from one of his classes by a uniformed officer and escorted to a school conference room for a thirty minute interrogation by the police and administrators he was never advised of his *Miranda* rights nor allowed to contact a grandmother. He ultimately confessed to involvement in the break-ins. He was ultimately adjudicated a delinquent. His motions to suppress his statements as involuntary or in violation of *Miranda* were denied and upheld by the North Carolina state courts.

On review, the Supreme Court reversed the delinquency adjudication. It held that the defendant's age was a factor to consider in evaluation of his *Miranda* claims. The lower court's failure to consider such fact in determining the alleged *Miranda* violation was contrary to Court precedent noting the uniqueness of a child's age in assessing alleged constitutional violations.

Bullcoming v. New Mexico, U.S. , 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)

Defendant Bullcoming was arrested in New Mexico for charges of driving while intoxicated. At his trial, evidence of his blood alcohol level was introduced by the prosecution through testimony of a lab analyst familiar with the laboratory procedures and the results of the analysis of defendant's blood sample but who did not do the analysis of defendant's blood sample. The New Mexico courts recognized the blood analysis was "testimonial evidence" but held the certifying analyst's testimony was not required in-court and that live testimony of another analyst satisfied the confrontation clause of the Sixth Amendment.

The Court determined that the confrontation clause required that the analysis results be testified to by the analyst who did the analysis and the certification. It held that surrogate testimony of the type at Bullcoming's trial did not meet constitutional requirements. It found that surrogate testimony would only be permissible where the certifying analyst was unavailable at trial and the defendant had an opportunity, pretrial, to cross-examine that particular scientist.

Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011)

In 2010 the ninth circuit granted habeas corpus relief to Doody finding that his *Miranda rights* had been violated and his confession was involuntary in regards to his prosecution for nine murders in Phoenix in 1991. The United States Supreme Court vacated that 2010 decision by the ninth circuit and remanded for reconsideration in view of its decision in **Florida v. Powell**, U.S. , 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010).

The ninth circuit, on remand, determined that the **Powell** decision was inapplicable to the court's previous determination that Doody's confession and statements were involuntary under the due process clause of the fourteenth amendment. It reaffirmed its 2010 decision. The Supreme Court denied further review. **Ryan v. Doody**, U.S. , 132 S.Ct. 414, 181 L.Ed.2d 287 (2011).

IV.SENTENCING

State v. Lewis, 226 Ariz. 124, 244 P.3d 561 (2011)

Defendant was placed on probation in 2003 for a drug offense. In 2008 his probation officer recommended that his probation be terminated as unsuccessful even though he had not paid fines or fees nor completed community service.

The state appealed arguing the trial court abused its discretion and that A.R.S. 13-901(E) did not authorize a trial court to grant early release to a defendant whose performance on probation had been less than satisfactory. The court of appeals affirmed the trial court.

On the review the supreme court likewise affirmed the trial court. It found no abuse of discretion by the trial court. The factors found by the trial court i.e. that defendant had otherwise benefited from probation and had made improvements, despite the arrearages in fines, fess and community service, sufficed to allow termination from probation, though unsuccessful.

State v. Regenold, 227 Ariz. 224, 255 P.3d 1028 (CA1 2011)

The court of appeals, after remand from the supreme court which held defendant's right to appeal existed from a contested probation revocation, vacated the defendant's sentence for luring a minor for sexual exploitation. The facts revealed that the alleged victim was really an undercover police office who was not under the age of fifteen. Consequently a sentence consistent with a dangerous crime against children was not permissible.

State v. Trujillo, 227 Ariz. 314, 257 P.3d 1194 (CA1 2011)

Defendant was charged with several counts of aggravated assault, dangerous and non-dangerous, following an altercation with a girlfriend. Defendant did not testify at trial of the charges but offered testimony from a witness who testified defendant was with her when the alleged altercation occurred. Defendant was convicted. At sentencing the trial judge excoriated the defendant for his lack of remorse and denial. The defendant received concurrent aggravated sentences for his three offenses.

On appeal the sentences were vacated and the case remanded for resentencing. The court found that the trial court's reference to defendant's lack of remorse and denial were impermissible sentencing considerations. The court's references to such were in conflict with defendant's Fifth Amendment right of silence, even at sentencing.

State v. King, 226 Ariz. 253, 245 P.3d 938 (CA2 2011)

Defendant was charged with murder after an altercation with a homeless person. During the altercation, defendant kicked the victim. Defendant was wearing cloth tennis shoes at the time of the kicking by defendant. The victim died three days later from blunt force trauma. Defendant was convicted of negligent homicide, dangerous, and sentenced to an enhanced mitigated term of imprisonment.

On appeal the sentence was vacated. The court found that precedent required that the alleged dangerous instrument in this case, a tennis shoe, could only be a dangerous

instrument if the state had proven either the shoe caused more harm than a bare foot or that the shoe had been wielded as a weapon. Neither of those facts were alleged or proven by the state. Remand for resentencing was directed.

Osterkamp v. Browning, 226 Ariz. 485, 250 P.3d 551 (CA2 2011)

Defendant pled guilty to several charges and was sentenced to a combination of consecutive and concurrent aggravated prison terms. He requested postconviction relief and the trial judge granted partial relief. Defendant again requested postconviction relief and requested counsel be appointed. The petition and request were denied.

On review, the court of appeals determined that defendant was entitled to appointment of counsel on his second postconviction proceeding. It reasoned that the first postconviction proceeding for a pleading defendant is equivalent of a trial defendant's first appeal. For pleading defendants, a timely second postconviction proceeding raising a claim of ineffective assistance of counsel of the initial Rule 32 counsel in a first postconviction proceeding is a procedural equivalent of a first postconviction proceeding commenced by a non-pleading defendant who wishes to raise a claim of ineffective assistance of appellate counsel. The case was remanded for appointment of counsel and further proceedings.

State v. Martinez, 226 Ariz. 464, 250 P.3d 241 (CA2 2011)

Defendant pled guilty to a number of dangerous offenses. He received concurrent and consecutive sentences. Following sentencing he filed a Rule 32 petition seeking to withdraw from the plea and alleged the state did not fulfill its promise to remain silent at sentencing concerning concurrent or consecutive sentences. He was granted a new sentencing due to the state's failure to remain silent but not allowed to withdraw from the plea. This relief was affirmed on review. Subsequently, before resentencing, he filed another Rule 32 petition alleging ineffective assistance at his first postconviction proceeding. The trial court found the petition was not ripe and dismissed it.

On review the court held it was error to dismiss the second petition as unripe. He had a right to challenge the assistance of counsel at his first postconviction proceeding. While he once again would not be allowed to withdraw from his plea, he could challenge his first postconviction counsel's efforts in litigating his claims in the first Rule 32 proceeding.

State v. Villegas, 227 Ariz. 344, 258 P.3d 162 (CA2 2011)

Defendant was charged and convicted at trial of luring a minor for sexual exploitation pursuant to A.R.S. 13-3554. The alleged minor was a Tucson Police Department detective posing as a fourteen-year-old girl. The court imposed a term of probation but classified the offense as a dangerous crime against children pursuant to A.R.S. 13-705.

On appeal the court vacated the sentence as the victim was not under fourteen and thus the crime could not be a dangerous crime against children. The case was remanded for resentencing. The defendant's knowledge or subjective belief is irrelevant to the question of whether in fact the victim was under 15 years-of-age.

Rasmussen v. Munger, Ariz. , 260 P.3d 296 (CA2 2011)

Defendant pled guilty to two counts of arson of an occupied structure. He was placed on seven year terms of probation for each offense, consecutive to each other. Additionally, he was sentenced to two consecutive one year jail terms as a condition of probation. His request for relief and release from jail after one year was denied.

On special action review the court ultimately concluded that pursuant to A.R.S. 13-901(F) the trial court could not impose more than one year in jail for a condition of probation. The two one year terms could be imposed for each probation grant. However, the second one year term could not be imposed until the second probation grant commenced. Defendant was released from the requirement to serve the second one year term while on the first period of probation.

Wall v. Kohli, U.S. , 131 S.Ct. 1278, 179 L.Ed.2d 252 (2011)

The Supreme Court reviewed a state defendant's claim for habeas corpus relief. The claim had been dismissed by the lower court as untimely and beyond the one year statute of limitations for filing a federal claim for habeas corpus relief. The Court found that the challenges the defendant filed in state court, a motion to reduce sentence and a claim for postconviction relief, both effectively tolled the time period for filing a federal habeas corpus petition. Hence, the district court's dismissal of the claim as untimely was error. The habeas claim was reinstated.

James v. Schriro, 659 F.3d 855 (9th Cir. 2011)

Defendant and two others were convicted of murder of an individual in 1981. Defendant's challenge to his conviction and resulting death sentence were affirmed by the Arizona state courts and the federal district court.

On appeal the court reviewed the record of the state court and district court. It concluded that defendant's trial counsel had not effectively presented mitigation evidence at the time of the state penalty hearings. The court determined evidence of child abuse, mental health and other substance abuse issues that were not discovered and presented would have persuaded a fact finder of sufficient mitigation for a life sentence. It directed habeas relief by vacating the death sentence

Greenway v. Schriro, 653 F.3d 790 (9th Cir. 2011)

Defendant was convicted of murder of a woman and her daughter in 1988. He was sentenced to death. His state appeal and subsequent postconviction challenges to his convictions and sentences were unsuccessful. His claim for habeas corpus relief was denied by the federal district court.

On appeal from the denial of habeas corpus relief the court reviewed the district court's findings that the claims of ineffective assistance of counsel at defendant's trial and on appeal were procedurally barred for failure to timely raise them in state court. The court concluded that the claims were not procedurally barred and the claims were remanded to the district court for full consideration on the merits. The court determined that the defendant's pro se attempts to present his claims during state postconviction proceedings demonstrated sufficient diligence for federal hearing and review.